

## A NEW FEDERAL SCHEME FOR THE PROTECTION OF HUMAN RIGHTS

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The development of overarching legislative schemes for protecting human rights in Australia has enjoyed considerable momentum over the last 10 years or so. Drawing on the United Kingdom *Human Rights Act 1998*, Australian jurisdictions have considered the adoption of the so-called 'dialogue' model of rights protection, with a role given to each arm of government to protect rights. The Australian Capital Territory introduced such a system in 2004<sup>1</sup> and Victoria followed in 2006.<sup>2</sup> In 2008, the Commonwealth government commissioned an independent inquiry to consider options for legislative reform at the federal level.

Although that Committee recommended the adoption of a UK-style 'dialogue' model of human rights protection,<sup>3</sup> the Commonwealth has, instead, decided to implement a more limited form of 'dialogue' model that imposes scrutiny requirements on the development of policy by the executive and during the legislative process. That new human rights scheme has now been implemented by the enactment of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

This article outlines how the new scheme is intended to operate and the significant implications it will have for Commonwealth government policy development and administrative decision-making.

### **The recommendations of the Human Rights Consultation Committee**

In December 2008 the Human Rights Consultation Committee was asked by the Commonwealth government to inquire into three questions: first, which human rights and responsibilities should be protected and promoted in Australia? Second, are human rights sufficiently protected and promoted? And third, how could Australia better protect and promote human rights and responsibilities?

Having undertaken a national consultation process, the Committee delivered its report containing a range of recommendations in September 2009. One of the key recommendations was for the Commonwealth to enact a Human Rights Act based on the 'dialogue' model of rights protection<sup>4</sup> with similar features to those in the ACT *Human Rights Act 2004* and the Victorian *Charter of Human Rights and Responsibilities Act 2006*. The features contemplated were:

- legislative and executive scrutiny mechanisms whereby the making of new laws and legislative instruments would have to be accompanied by statements of compatibility with human rights and then be reviewed by a parliamentary joint committee on human rights prior to enactment;<sup>5</sup>

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- an interpretative rule requiring legislation to be interpreted consistently with human rights;<sup>6</sup>
- if considered practical, a power for the High Court to issue a declaration of incompatibility with human rights if the Court was unable to interpret a provision consistently with human rights;<sup>7</sup> and
- an obligation on Commonwealth public authorities to act in a manner compatible with human rights and to give human rights proper consideration when making decisions.<sup>8</sup>

Even if a Human Rights Act were not adopted, it was envisaged that the legislative and executive scrutiny process would still be implemented,<sup>9</sup> along with an amendment to the *Acts Interpretation Act 1901* (Cth) to require legislation to be interpreted consistently with rights<sup>10</sup> and an amendment to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to make human rights relevant considerations to be taken into account in government decision-making.<sup>11</sup>

As for what human rights should be protected, the Committee identified a list of derogable and non-derogable rights that should be included in a federal Human Rights Act.<sup>12</sup> Further, the Committee generally recommended that the 'Federal Government operate on the assumption that, unless it has entered a formal reservation in relation to a particular right, any right listed in the following seven international human rights treaties should be protected and promoted'.<sup>13</sup>

- the *International Covenant on Civil and Political Rights*;
- the *International Covenant on Economic, Social and Cultural Rights*;
- the *Convention on the Elimination of All Forms of Racial Discrimination*;
- the *Convention on the Elimination of All Forms of Discrimination Against Women*;
- the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*;
- the *Convention on the Rights of the Child*; and
- the *Convention on the Rights of Persons with Disabilities*.

The Committee recommended that a limitation clause for derogable civil and political rights, similar to that contained in the ACT and Victorian legislation,<sup>14</sup> be included in the proposed Human Rights Act.

### **The government's response**

When releasing *Australia's Human Rights Framework* in 2010, the then Attorney-General indicated that the government would not seek to enact a Human Rights Act. The Attorney-General explained that many Australians were concerned about its possible consequences and that the government believed 'that the enhancement of human rights should be done in a way that as far as possible unites, rather than divides, our community'.<sup>15</sup> The recommended amendments to the *Acts Interpretation Act* and the *Administrative Decisions (Judicial Review) Act* were not taken up.

Given the High Court's 2011 decision in *Momcilovic v The Queen*,<sup>16</sup> which considered the interpretive rule and declaration of inconsistency power in the Victorian *Charter*, there were key aspects of the proposed Human Rights Act which would have run into constitutional

difficulty. The power to make a declaration of incompatibility could not have been given to the High Court as proposed (or any other court for that matter) and the extent to which a federal interpretive rule would have survived constitutional scrutiny remains unclear following that case<sup>17</sup>.

Although rejecting a Human Rights Act, the government decided to adopt the recommendations to establish the legislative and executive scrutiny mechanisms; these mechanisms have now been implemented with the enactment of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).<sup>18</sup>

### ***Human Rights (Parliamentary Scrutiny) Act 2011***

Two principal human rights scrutiny mechanisms are created by the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### *Statements of compatibility*

Section 8 of that Act provides that a member of Parliament who proposes to introduce a Bill into Parliament 'must cause a statement of compatibility to be prepared', which is then presented to Parliament. The same obligation is placed on the rule-maker in relation to the making of a legislative instrument to which s 42 of the *Legislative Instruments Act 2003* (Cth) applies and the compatibility statement must be included in the explanatory statement relating to the legislative instrument (see s 9). These statements of compatibility 'must include an assessment of whether [the provisions are] compatible with human rights' (ss 8(3) and 9(2)).

One immediate and practical question that will arise is what level of detail will be required in a statement of compatibility? Under the similar process in the ACT *Human Rights Act*, the ACT government has, at times, been criticised for simply stating whether or not a Bill is consistent with human rights without setting out the reasons for that conclusion.<sup>19</sup> The Victorian requirement is for a statement to set out 'how' a Bill is compatible with human rights and, consequently, more detailed statements of compatibility have been prepared in that jurisdiction.<sup>20</sup>

It certainly seems to have been contemplated that, for the federal scheme, an 'assessment' of compatibility will need to go beyond a mere conclusion of compatibility. The Explanatory Memorandum indicates that statements 'are intended to be succinct assessments aimed at informing Parliamentary debate and containing a level of analysis that is proportionate to the impact of the proposed legislation on human rights'.<sup>21</sup>

Despite the obligatory form of language used in the drafting of the statement of compatibility provisions, a failure to comply with the statutory requirements does not affect the validity, operation or enforcement of the provisions in question or any other law of the Commonwealth (ss 8(5) and 9(4)). Furthermore, they are not binding on any court or tribunal (ss 8(4) and 9(3)).

#### *Parliamentary committee*

The Act also provides for the establishment by Parliament of the Parliamentary Joint Committee on Human Rights (s 4), regulates its membership, powers and proceedings (ss 5 and 6) and sets out its functions (s 7). The functions of the committee are limited to: (a) examining Bills and legislative instruments that come before either House, for compatibility with human rights and to report to Parliament; (b) examining existing Acts for compatibility

with human rights and to report to Parliament; and (c) to inquire into matters referred by the Attorney-General and to report to Parliament.

*What human rights are protected?*

Importantly, the pivotal expression 'human rights' is defined to mean 'the rights and freedoms recognised or declared by' the seven core UN human rights treaties nominated by the Human Rights Consultation Committee, as they apply to Australia (s 3(1) and (2)). This is a significant development on the range of rights protected in the ACT *Human Rights Act* and the Victorian *Charter*, which are limited to rights drawn from the International Covenant on Civil and Political Rights.

**The impact of the new legislative scheme**

***Federal policy development and law-makers***

This new human rights scheme will have important implications for federal policy developers and law-makers. Those proposing new federal legislation and legislative instruments will have to make an assessment of whether the provisions are compatible with a range of human rights set out in the seven core UN treaties. The Parliamentary committee will also be required to make the same assessment. Familiarity with those treaties will be required by all concerned, along with an appreciation of how to approach an assessment of the provisions.

As indicated by the then Attorney-General in his second reading speech, the provisions are intended to have a transformative impact on policy development and law making:

As a government, we are focused on influencing the culture and practice of decision makers, policy developers and law-makers at the starting point in the development of policy and laws and creating an appreciation as to how laws impact on the individuals to which the laws apply. The bill includes measures which will mean that the executive in proposing the legislation and the parliament in considering legislation will have greater regard to the impact of laws on the rights of citizens.<sup>22</sup>

Although the government declined to enact the 'dialogue' model of human rights protection recommended by the Human Rights Consultation Committee and reflected in the ACT and Victorian schemes, it nonetheless considers the enacted scrutiny scheme will create its own form of 'dialogue' between the executive, the parliament and the citizens of Australia. The statement of compatibility allows the executive to inform members of Parliament of the human rights impact of proposed laws and the parliamentary committee can establish a dialogue between the Parliament and the people on the human rights impact of the law.<sup>23</sup>

***Interpretation by the judiciary, tribunals and legal advisers***

The impact of this new human rights scheme does not end at the policy development and law making stages. It will also affect the judicial task of statutory interpretation. The form of 'dialogue' model adopted in the ACT *Human Rights Act* and the Victorian *Charter* clearly involves the judiciary in a 'dialogue' on rights protection, through the application of the rights-consistent interpretive rule and by the Supreme Court in each jurisdiction making a declaration of incompatibility where rights-consistent interpretations cannot be adopted. The interpretive rule in those jurisdictions is to be applied by anyone interpreting the provisions, so all courts, tribunals and legal advisers (amongst others) are drawn into the rights-consistent interpretive process.

However, the new federal human rights scheme does not contain an interpretive rule or the judicial power to make a declaration. Nor has the Commonwealth amended the *Acts*

*Interpretation Act 1901* to include an interpretive rule as recommended in the Report by the Human Rights Consultation Committee. The 'dialogue' referred to by the then Attorney-General is notionally between the executive, the parliament and the people.

Nevertheless, the new scheme will have an impact on how courts interpret Commonwealth legislation and legislative instruments made following the introduction of the scheme. If legislative provisions have been assessed by the executive and the legislative committee as consistent with human rights, and enacted on that basis, then interpretations of those provisions consistent with human rights may well be required by the courts.

This position was foreseen by the then Attorney-General when introducing the legislation into Parliament:

After enactment, statements of compatibility may also be of assistance to the courts. Currently, in determining the meaning of provisions in the event of ambiguity, a court may refer to other material considered by parliament in the passage of legislation. This includes accompanying explanatory memoranda, second reading speeches and parliamentary committee reports. A statement of compatibility and a report of the Joint Committee on Human Rights, while not binding on a court or tribunal, could be used by the court or tribunal to assist in ascertaining the meaning of provisions in a statute where the meaning is unclear or ambiguous.<sup>24</sup>

Thus, although the new scheme does not contain an interpretive rule similar to those contained in the ACT *Human Rights Act* and the Victorian *Charter*, the interpretive process by courts (and, by extension, tribunals and legal advisers) will nevertheless be affected.

#### ***Impact on executive decision-makers under such laws***

Although the Commonwealth has not imposed a duty on Commonwealth government officers and agencies to act consistently with human rights or to take rights into account when making decisions, the new federal scheme will necessarily affect the actions undertaken and decisions made by Commonwealth decision-makers under Commonwealth provisions made following the introduction of the new scheme. Where those provisions have been assessed as human rights compatible by policy developers or law-makers, it will be fair to assume that exercise of power by executive officers under those provisions will have to be consistent with human rights. Thus, although the Commonwealth rejected the Human Rights Consultation Committee's recommendation to amend the *Administrative Decisions (Judicial Review) Act* to make human rights relevant considerations to be taken into account in government decision-making, the seven core UN treaties may well be relevant to the scope of decision-making power.

#### ***Impact on interpretation not to be overstated***

The impact of the new scheme on interpretation should not be overstated. First, it will only affect Acts and legislative instruments made after the introduction of the scrutiny scheme. Second, consideration of rights consistent interpretations will only be undertaken in cases of ambiguity. The High Court has made it clear that the text of provisions will be given full effect if it is clear on its face, irrespective of what is in the historical record.<sup>25</sup> This would be the case even if that clear meaning is, in the court's view, inconsistent with human rights, and contrary to the assessment of compatibility made in the statement of compatibility or report of the parliamentary committee. After all, as the then Attorney-General recognised, the courts will not be bound by these executive and legislative assessments of compatibility. Third, there is already a common law principle of statutory interpretation that provisions are to be interpreted consistently with international obligations, although there is some uncertainty as to the scope of that principle.<sup>26</sup> Finally, there is also a common law principle of interpretation – increasingly now referred to as the principle of legality – that assumes that

fundamental common law rights will not be abrogated by Parliament unless clear language is used and, as was emphasised in *Momcilovic*,<sup>27</sup> there is some degree of overlap between those fundamental common law rights and the human rights found in the seven core UN treaties, particular civil and political rights.

Nevertheless, the provisions will have an important impact on the process of interpretation. In cases of ambiguity, a court will look to the historical record for context, and that context will include executive and legislative assessments of compatibility with the human rights set out in the seven core UN treaties. That will necessarily impact on interpretations adopted by tribunals and on advice given by legal advisers on the meaning and operation of provisions, and the scope of executive decision-making pursuant to those provisions.

## Conclusion

The new federal human rights scheme in the *Human Rights (Parliamentary Scrutiny) Act* will give rise to a range of challenges. There are basic questions about the executive and legislative assessment processes that will have to be resolved. For example, what does 'compatible with human rights' mean? Many human rights are not absolute, they can be qualified if there is appropriate justification. Will there be incompatibility when a right has been burdened, or only when the burden cannot be justified? If the latter, what tests will be adopted to determine whether a breach has been justified? Will we apply the tests developed by international tribunals and UN bodies, or will home-grown compatibility tests have to be developed?

Education programs have been, and will have to continue to be, rolled out for policy developers, law-makers and decision-makers. These programs will have to address not only the content of the seven core human rights treaties, but also how the requirements of the new scheme will translate into actual decision-making processes. The experience in the ACT and Victoria suggests that education programs will have to be appropriately designed for all levels of government decision-makers.<sup>28</sup>

Since the scrutiny processes are only sketched out in the *Human Rights (Parliamentary Scrutiny) Act*, administrative and legislative processes and practices will have to be adopted to fill in the gaps. It may well be that the ACT and Victorian experiences will provide lessons for how things should be done.

Ultimately, it is clear that the new federal human rights scheme created by the *Human Rights (Parliamentary Scrutiny) Act* will have significant consequences for government policy development and administrative decision-making. As the then Attorney-General said in his second reading speech, the intention of the new scheme is to influence the culture and practice of government decision-making, which will entail important changes in the way that government business is conducted.

## Endnotes

- 1 *Human Rights Act 2004 (ACT)*.
- 2 *Charter of Human Rights and Responsibilities 2006 (Vic)*.
- 3 *National Human Rights Consultation Report (2009)*, recommendation 18.
- 4 *Ibid*, recommendation 19.
- 5 *Ibid*, recommendations 26, 27.
- 6 *Ibid*, recommendation 28.
- 7 *Ibid*, recommendation 29.
- 8 *Ibid*, recommendations 20, 30.
- 9 *Ibid*, recommendation 6.
- 10 *Ibid*, recommendation 12.
- 11 *Ibid*, recommendation 11.

- 12 Ibid, recommendations 22, 24 and 25.
- 13 Ibid, recommendation 11. However, the Committee further recommended 'that, if economic and social rights are listed in a federal Human Rights Act, those rights not be justiciable and that complaints be heard by the Australian Human Rights Commission' (recommendation 22).
- 14 Ibid, recommendation 23.
- 15 *Australia's Human Rights Framework* (2010), Foreword.
- 16 [2011] HCA 34; (2011) 280 ALR 221; 85 ALJR 957.
- 17 For an analysis of the various constitutional issues dealt with by the High Court in *Momcilovic*, see Will Bateman and James Stellios, 'Chapter III of the Constitution, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) *Melbourne University Law Review* (forthcoming).
- 18 The Commonwealth has also enacted the *Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Act 2011* (Cth), which amends the *Administrative Appeals Tribunal Act 1975* (Cth) to include the President of the Australian Human Rights Commission as a member of the Administrative Review Council and contains consequential amendments to the *Legislative Instruments Act 2003* (Cth).
- 19 See, eg, The ACT Human Rights Act Research Project, Australian National University, *The Human Rights Act 2004 ACT: The First Five Years of Operation – A Report to the ACT Department of Justice and Community Safety* (2009) 35-37.
- 20 See Parliament of Victoria, Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 88.
- 21 Explanatory Memorandum, Human Rights (Parliamentary Scrutiny) Bill 2010, 4.
- 22 Second Reading Speech, Human Rights (Parliamentary Scrutiny) Bill 2010, 2 June 2010, 4900 (Robert McClelland MP).
- 23 Ibid.
- 24 Ibid. See also Explanatory Memorandum, Human Rights (Parliamentary Scrutiny) Bill 2010, 5.
- 25 See, eg, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, [47]; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [31].
- 26 See the discussion in D C Pearce and RS Geddes, *Statutory Interpretation in Australia* (7th ed, 2011) 79-82.
- 27 [2011] HCA 34; (2011) 280 ALR 221; 85 ALJR 957, [43]-[44] (French CJ); [444] (Heydon J).
- 28 See Parliament of Victoria, Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 79, 132; The ACT Human Rights Act Research Project, Australian National University, *The Human Rights Act 2004 ACT: The First Five Years of Operation – A Report to the ACT Department of Justice and Community Safety* (2009) 61, 62.